

Chapter 3: SENTENCING WITHIN THE BOX

The Commission anticipates that most cases will be sentenced within the box. There are 45 boxes on the Master Grid and 15 boxes on the Drug Grid. In some boxes, a prison sentence is the only option. In some boxes, either a prison sentence or a short split sentence is an option. In the remaining boxes, a prison sentence, a short split sentence, or probation is an option. The boxes are clearly marked:

White/unshaded	Prison only
Dark gray/dark shaded	Prison or a short split
Light gray/light shaded	Prison, a short split, or probation

In determining the parameters of the boxes, the Commission relied on both old law (indeterminate) and new law (determinate) historical data from 1996-2003. Starting from the principle that guideline sentences should fall in the middle 50% of historical sentences, the Commission determined that probation should be available when, in the past, 25% or more of the sentences in that box were probation sentences. Similarly, a short split sentence should be available when, in the past, 25% or more of the sentences in that box were either probation or a short split sentence. For all boxes, the range for the length of prison sentences represents what historically has been the middle 50% of prison sentences for that box. Some adjustments were made for continuity and symmetry. *See* 2003 Annual Report, Chapter 3, for a discussion of the Commission's methodology.

3.1 What Cannot Be Considered

Except for hate crimes involving a sentencing enhancement under D.C. Code §§ 22-2104.01, 22-3703, and 24-403.01(b-2)(2)(A), the following factors may not be considered in sentencing a defendant:

- (1) Race;
- (2) Gender;
- (3) Marital status;
- (4) Ethnic origin;
- (5) Religious affiliation;
- (6) Sexual orientation

3.2 What Can Be Considered

In determining an appropriate sentence within the box, the court may take into consideration any factor other than those listed above.

Any other information that the court could have taken into consideration before the introduction of the voluntary guidelines, may be taken into consideration in determining where a person should be sentenced within the box. None of these reasons, however, provides a basis for sentencing outside the box unless it relates to a departure principle. *See* § 5.2, Departures, § 7.7.

3.3 In/Out Decision

In determining the appropriate sentence, the first decision the court must make is the "in/out" decision: whether the defendant should be sent "in" to prison or whether the defendant should be

“out” on probation or a short split sentence.¹¹ For many of the boxes, this decision has already been made. The white boxes are prison only. If the instant offense falls into a white box, then the court must decide “in” to prison unless the court finds that one of the mitigating factors applies and chooses to sentence the offender “out” to probation or a short split as a result. In the shaded boxes, the decision is left to the judge to decide. In the light gray boxes, probation is permissible. Even without finding a mitigating or aggravating factor applicable, the court has the option to impose probation, a short split or straight prison. Each of those “in/out” decisions would be compliant. In the dark gray boxes, a short split sentence is permissible. The court has the option to impose a short split sentence or a straight prison sentence and, absent a finding that a mitigating factor applies, only those in/out options would be compliant. *See* § 3.4 for further discussion of probation.

In those boxes where probation or a short split is permissible and the judge decides to use one of these options, in order for the sentence to be compliant with the guidelines, the prison term that is imposed and suspended, in all or part, must fall within the range provided in that box.

Example

Box 7A on the Master Grid is light gray which means that it is a probation permissible box. The prison range in Box 7A is 12 to 36 months. A sentence of 24 months plus 3 years supervised release, ESS all, with five years probation would be a guidelines compliant sentence. A sentence of five years probation would not be compliant and would also be illegal because probation cannot follow the suspension of imposition of sentence, *see* D.C. Code § 16- 710, unless it is a Youth Rehabilitation Act sentence, *see* D.C. Code § 24-903. A sentence of 8 months, ESS all, with five years probation would not be compliant because the minimum prison sentence imposed initially must be at least 12 months. Similarly a sentence of 40 months, ESS all, with five years probation would not be compliant because the maximum prison sentence imposed initially must not be more than 36 months.

After the court makes the in/out decision, the court should determine the length of the option chosen. For example, if the court decides “out,” then the court must decide how long the probation term should be. *See* D.C. Code § 16-710. If the court decides “in,” then the court must determine the length of the prison sentence (including whether to impose a long split). *See* § 3.6 for further discussion of prison sentences. If the court decides to impose a short split, the court must decide the length of the prison sentence to impose, how much of that sentence to suspend and the length of the term of probation to follow. *See* § 3.5 for further discussion of short split sentences.

¹¹ The Sentencing Reform Act of 2000 allowed certain terms of incarceration or types of custody to be imposed as a condition of probation. Weekend sentences or sentences to a halfway house for felony convictions may be ordered only as a condition of probation. The U.S. Bureau of Prisons cannot carry out such intermediate sanctions and, therefore, they may only be imposed as a condition of probation. *See* § 10.14 and D.C. Code §16-710(b-1).

3.4 Probation (ESS All)

Probation is a compliant sentence only in the light gray boxes. To impose probation, the court must impose a prison sentence that falls within the prison range in the appropriate light gray box, suspend execution of all of it [ESS all] and impose up to 5 years probation.¹²

Two principles that the Commission adopted are to some extent in conflict in cells where probation is a permissible sentence: the principle that the guidelines should try to eliminate the top and bottom 25 percent of sentences (except where a departure principle applies), and the principle that probation should be a permissible sentence in any cell where 25 percent or more of the sentences were to probation historically. The Commission recognizes that a portion of historic sentences to probation – like a portion of the most severe sentences imposed historically – were outliers, that is, they were outside the norm given the offense and the criminal history of the defendant. However, unlike exceptionally harsh sentences, which were more easily identified when compared against other sentences, exceptionally lenient sentences were statistically indistinguishable from sentences where probation was indeed appropriate. For this reason, while the Commission was able to exclude from its recommended sentence ranges anomalously “high” sentences, it was not able to impose a comparable bright-line limitation on anomalously “low” probation sentences in every cell. It is therefore incumbent on individual judges to consider the historical percentage of probationary sentences in a given cell when determining whether probation is appropriate in a given case. *See* Appendices E and F. In making this determination, judges should be guided by the principle that it was the intent of the Commission to eliminate both the top 25 percent and the bottom 25 percent of sentences. It is accordingly the intention and the expectation of the Commission that, just as the guidelines should eliminate a portion of anomalously harsh sentences, so too should the guidelines eliminate a portion of anomalously lenient sentences.

Note: The guidelines make no recommendation as to the length or terms or conditions of probation. Any period of probation up to the statutory maximum of 5 years is compliant and the judge may impose any terms or conditions available prior to the guidelines. *See* D.C. Code § 16-710(b).

3.5 Short Split Sentences (ESS All but Six Months or Less)

A short split sentence is a compliant sentence in the shaded (dark gray and light gray) boxes. To impose a short split, the court must impose a prison sentence that falls within the prison range in the appropriate dark gray or light gray box, suspend execution of all but six months or less -- but not all -- of that sentence, and impose up to 5 years probation. If the judge suspends all of the prison term, that would be considered to be probation and not a short split and it would not be compliant in a dark gray box. *See* § 3.4, *supra*.

Note: When imposing a short split sentence, the court should (a) impose the prison term and the supervised release term, (b) suspend execution of all but six months or less of the prison term, but not all of it; (c) suspend all of the supervised release time and (d) place the defendant on probation for a period not to exceed five years. *See* Appendix G.

¹² D.C. Code § 16-710 does not authorize probation following suspension of imposition of sentence [ISS)]. *See Schwasta v. United States*, 392 A.2d 1071, 1077 (D.C. 1978) (D.C. Code § 16-710 “permits the trial court to grant probation only after it has imposed a sentence and suspended its execution”). The Youth Rehabilitation Act, however, does. DC. Code § 24-903 (the court “may suspend the imposition or execution of sentence and place the youth offender on probation”).

Note: If the court suspends imposition of sentence (ISS), that is considered to be probation and not a split sentence. ISS sentences are not compliant in the white or dark gray boxes, unless a departure principle applies.

Note: If the court suspends execution of all of the prison term, that is considered to be probation and not a split sentence. “ESS all” sentences are not compliant in the white or dark gray boxes, unless a departure principle applies.

3.6 Prison

Prison is a compliant sentence in all of the boxes on both grids. Each box has two numbers. The lower number represents the fewest number of months for a compliant prison sentence; the upper number represents the greatest number of months for a compliant prison sentence.

The court may impose any prison sentence within the range specified in the box where the offense of conviction and criminal history score of the offender intersect. For example, a person convicted of armed robbery who has previously been convicted of attempted robbery *in the ten-year window* and, therefore, has one criminal history point would be in Box 5B. In Box 5B, the prison range is between 48 months and 96 months. The defense can argue that a sentence in the lower part of the range is appropriate and the prosecution can argue that a sentence in the higher part of the range is merited. Unless a principle applies that would expand the box or take the case “out of the box,” the court must sentence within the established range to be in compliance with the guidelines.

The court may also impose a “long-split” sentence, that is, a sentence where the amount of time to be served after a portion of the entire prison term is suspended, still falls within the range for prison sentences in that box. *See* § 7.17. Thus, both the sentence imposed and the portion to be served initially would fall within the prison range in that box.

Note: Column 6 does not have an upper number for the prison range but rather a plus sign. A defendant with a criminal history score that places him or her in Column 6 can be sentenced to any period or incarceration up to the statutory maximum (less, of course, the amount reserved for back up time for non-Class A felonies).

3.7 Mandatory Minimums

Mandatory minimums are the one exception to the amount of discretion the court has in imposing a guideline compliant sentence within the box. The guidelines do not change statutory mandatory minimums. A sentence cannot be lower than the mandatory minimum even if lower sentences are otherwise available in that box.

Offenses that require a mandatory minimum sentence are:

First-degree murder of a police officer	LWOR
First-degree murder	30 years
Armed carjacking	15 years
Carjacking	7 years
Crimes of violence while armed with a firearm -- 2nd offense	10 years
Crimes of violence while armed with a firearm -- 1st offense	5 years
Crimes of violence while armed -- 2nd offense	5 years
Possession of a firearm during a crime of violence/dangerous crime	5 years

3.8 Statutory Minimums

Some offenses have a statutory minimum that is not a mandatory minimum. For these offenses, the judge must impose at least the statutory minimum sentence, but may be able to suspend all or part of it depending on applicable sentencing box and where the statutory minimum fits within that box if at all.

All but two of statutory minimums are either below or within the prison range in the lowest possible box for that offense and criminal history score, so that these statutory minimums do not conflict with guideline prison ranges and the same options are available for these offenses as for any other in the same Offense Severity Group (prison only, long splits, short splits, or probation). However, two statutory minimums are much higher than the guideline ranges in Columns A through D: 84 months for enticing a child (M8) after a conviction for a crime of violence and 60 months for maintaining a place to manufacture, distribute or store narcotic or abusive drugs (D2). For these offenses, the judge should impose the statutory minimum and then, depending on the judge's in/out and sentence length decisions, should suspend at least the portion of the sentence that exceeds the higher number in the prison range. The judge has the option to suspend more, but (absent a departure or enhancement) should not do less to result in a guideline compliant sentence.

A complete list of offenses with statutory minimums can be found in Appendix I.

Example 1

The statutory minimum for first degree burglary is 60 months. The guideline prison range for a person convicted of first degree burglary with zero criminal history points in Box 5A is 36 to 84 months. It is a prison only box. The judge must impose the statutory minimum of 60 months (and could impose a guideline compliant sentence of up to 84 months). However, since the defendant is a first offender, the judge might decide to suspend execution of 24 months of the prison sentence (60 months ESS all but 36 months) and place the defendant on probation for five years. A long split sentence such as this is compliant with the guidelines and with the statute.

Example 2

The statutory minimum for second degree burglary is 24 months. The guideline prison range for a person convicted of second degree burglary with zero criminal history points in Box 7A is 12 to 36 months. Box 7A is a light gray box. It is a prison, short split, or probation permissible box. A sentence of 12 months would be a guidelines compliant sentence, but would not be a legal sentence. The judge must impose the statutory minimum of 24 months (and could impose a guideline compliant sentence of up to 36 months). If the judge believes that a shorter prison sentence or no prison sentence is appropriate, he or she has the following guideline compliant options: (1) impose a sentence of 24 months and suspend execution of all but 12 months (a long split); (2) impose a sentence of 24 months and suspend execution of all but 6 months or less (a short split); (3) impose a sentence of 24 months and suspend execution of all of it (probation). For each of these options, the judge could then place the defendant on probation for up to five years.

3.9 Statutory Maximums

Some offenses have a statutory maximum less back-up time that is less than the maximum sentence in the applicable sentence box. For these offenses, the judge cannot impose a sentence greater than the statutory maximum less back-up time.

Example

The statutory maximum for attempt robbery is 3 years (36 months). D.C. Code § 22-2802. The amount reserved for incarceration following revocation of release (back-up time) for this offense is one year. D.C. Code § 24-203.1(b)(7). Thus, the maximum sentence that can be imposed, absent an enhancement, is 24 months. Attempt robbery is in Group 8. The higher number in the prison range in boxes 8B, 8C, and 8D is greater than 24 months. Therefore, the maximum sentence that can be imposed in each of these boxes for attempt robbery is 24 months and not 28, 32, or 36 months respectively.